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NO.

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IN THE

Supreme Court of the United States

October Term, 1982

PATRICIA W. DIXON, Petitioner

v.

CHARLES A. DIXON, Respondent

PETITION FOR A WRIT OF CERTIORARI FROM THE SUPREME COURT OF GEORGIA

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QUESTION PRESENTED FOR REVIEW

I. Whether blanket application of Official Code of Georgia, §5-6-35(a)(2) [Georgia Code Annotated, §6-701.1] to all cases arising from the marital relationship is a denial of due process of law.

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Opinion

No opinion was issued by the Supreme Court of Georgia.

Jurisdiction

The judgment of the Supreme Court of Georgia was entered on March 1, 1983. A timely Motion for Reconsideration was denied on March 16, 1983, and this petition for certiorari is filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1); 28 U.S.C. Section 1256(2).

STATUTORY PROVISIONS INVOLVED

Official Code of Georgia, §5-6-33. **Right of appeal generally.**

(a) Either party in any civil action and the defendant in any criminal proceeding in superior court, state, or city courts, may appeal from any sentence, judgment, decision or decree of the court, or of the judge thereof in any matter heard in chambers.

Official Code of Georgia, §5-6-34. **Judgments and rulings deemed directly appealable; procedure for review of judgments, etc., not subject to direct appeal; scope of review.**

(a) Appeals may be taken to the Supreme Court and the Court of Appeals from the following judgments and rulings of the superior courts, the constitutional city courts, and such other courts or tribunals from which appeals are authorized by the Constitution and the laws of this state:

(1) All final judgments, that is to say, where the case is no longer pending in the court below, except as provided in Code Section 5-6-35.

Official Code of Georgia, §5-6-35. **Cases in which application for appeal required; contents, filing, and service of application; exhibits; response by opposing party; issuance of appellate court order granting or denying appeal; procedure following grant of appeal; supersedeas.**

(a) Appeals in the following cases shall be taken as provided in this Code section:

(2) Appeals from judgments or orders granting or refusing a divorce or temporary or permanent alimony, awarding or refusing to change child custody, or holding or declining to hold persons in contempt of such alimony or child custody judgment or orders.

Article 6, §2, ¶4 of the Constitution of the State of Georgia states:

"The Supreme Court shall have no original jurisdiction but shall be a court alone for the trial and correction of errors of law from the superior courts and the city courts of Atlanta and Savannah, as existed on August 16, 1916, and such other like courts as have been or may hereafter be estalished in other cities, in all cases that involve the construction of the Constitution of the State of Georgia or of the United States, or of treaties between the United States and foreign governments; in all cases in which the constitutionality of any law of the State of Georgia or of the United States is drawn in question; and until otherwise provided by law, in all cases respecting title to land; in all equity cases; in all cases which involve the validity of, or the construction of wills; in all cases of conviction of a capital felony; in all habeas corpus cases; in all cases involving extraordinary remedies; in all divorce and alimony cases, and in all cases certified to it by the Court of Appeals for its determination." [Emphasis added].

Official Code of Georgia, §9-11-60(e). **Complaint in equity.**

Complaint in equity may be brought to set aside a judgment for fraud, accident, or mistake, or the acts of the adverse party unmixed with the negligence or fault of the complainant. Where a judgment is subject to be set aside in equity, the court may grant such other and further relief, legal or equitable, as may be necessary to afford complete relief.

Official Code of Georgia, §23-2-60. **Annulment of conveyances for fraud; relief against awards, judgments, and decrees.**

Fraud will authorize equity to annul conveyances, however solemnly executed, and to relieve against awards, judgments, and decrees obtained by imposition.

Official Code of Georgia, §23-2-1. **When equity will set aside judgment.**

Equity will interfere to set aside a judgment of a court having jurisdiction only where a party had a good defense of which he was entirely ignorant or where he was prevented from presenting his defense by fraud or accident or the act of the adverse party, unmixed with fraud or negligence on his part.

Fourteenth Amendment to the United States Constitution:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Fifth Amendment to the United States Constitution:

". . . nor be deprived of life, liberty, or property, without due process of law;. . . ."

Statement of the Case

On April 12, 1979 the Plaintiff-Petitioner and the Defendant-Respondent entered into an out-of-court Settlement Agreement concerning the issues of property division, alimony and child support, and said Agreement was made an Order of the Court on April 27, 1979. The Plaintiff-Petitioner entered into the

Agreement based on facts and circumstances presented at that time which were likely to influence her judgment.

Subsequent to the signing of the Agreement, the Plaintiff-Petitioner obtained information that the Defendant-Respondent had misrepresented, by way of concealment, the financial circumstances of the parties at the time of the signing of the Agreement.

On December 3, 1981, some two years and eight months after the Agreement was made the Order of the Court, the Plaintiff-Petitioner filed a Complaint in Equity pursuant to Official Code of Georgia, §9-11-60(e) [Georgia Code Annotated, §81A-160(e)], requesting the Court to vacate and set aside the Settlement Agreement entered into on the 27th day of April, 1979 due to fraud on the

part of the Defendant in procuring said Agreement.

In the Plaintiff-Petitioner's complaint, she alleged that on April 12, 1979 she entered into a Settlement Agreement with the Defendant determining the issues of property division, child support and all other issues properly resolved by the parties. She further alleged that she entered into the Agreement based on facts and circumtances presented at the time which were likely to influence her judgment. Plaintiff further alleged that subsequent to the signing of the Agreement, she was informed that the Defendant had received an inheritance in excess of $20,000 which the Defendant knew at the time of the negotiations for settlement and that the Defendant fraudulently concealed said

information. The Agreement entered into by the Plaintiff was obtained by fraudulent concealment of facts and circumstances likely to influence her judgment and the said fraudulent concealment of facts and circumstances was made with an intent to deceive and defraud the Plaintiff and to induce the Plaintiff into entering into the Agreement. Plaintiff further states that she relied upon the representations and fraudulent concealment of facts and was induced into entering into said Agreement; that the fraudulent concealments by the Defendant were unmixed with any negligence or fault of the complainant; and as a result of the acts of the Defendant, the Plaintiff has been damaged.

The Plaintiff prayed that the Court vacate the judgment entered on April 27,

1979 with respect to the Settlement Agreement and to award costs of Court and attorney fees and whatever else the Court deemed fair and equitable.

On January 7, 1982 counsel for the Defendant filed a Motion to Dismiss for failure to state a claim upon which relief could be granted, and said motion was denied on February 1, 1982.

On May 27, 1982 the Defendant filed a Motion for Summary Judgment, stating there was no material issue of fact as to the alleged fraud, and the Defendant was entitled to judgment as a matter of law. On November 22, 1982 the Defendant's Motion was granted based on the legal basis that as a matter of law concealment did not amount to fraud; and as a matter of law, the Plaintiff was negligent in obtaining correct information, and Plain-

tiff's acceptance of benefits under the Agreement estopped her from vacating the Agreement.

The Plaintiff-Petitioner herein timely filed an appeal to the Supreme Court of Georgia, Case No. 39608, under "equity" jurisdiction, and the Supreme Court of Georgia subsequently dismissed the Plaintiff-Petitioner's appeal for failure to comply with Discretionary Appeal Procedures. The Plaintiff-Petitioner timely filed a Motion for Reconsideration and raised the issues of equal protection and denial of due process of law.

REASONS FOR GRANTING THE WRIT

1. The Decision below conflicts with a person's constitutional right to due process of law and equal protection of the law, and does not tend to serve any legitimate state interest.

The Georgia Code specifically allows a person to file a complaint in equity to set aside a judgment for fraud, Official Code of Georgia, §9-11-60(e), and subsequently have an automatic right of appeal to the Supreme Court of Georgia. Article 6, §2, ¶4, Constitution of the State of Georgia; Official Code of Georgia, §5-6-33.

The automatic right of appeal attaches to all final judgments, that is to say, where a case is no longer pending in the Court below, except as provided in Georgia Code §5-6-35. Official Code of

Georgia, §5-6-34. Official Code of Georgia, §5-6-35 dictates that appeals from judgments or orders granting or refusing a divorce or temporary or permanent alimony, awarding or refusing to change custody or holding or declining to hold persons in contempt of such alimony or child custody judgments or orders, shall be appealed by application.

Appellate practice rules were adopted by the General Assembly for the primary purpose of securing speedy and uniform justice in a uniform and well-ordered manner; they were not adopted to set traps and pitfalls, by way of technicalities, for unwary litigants. Chambliss v. Hall, 113 Ga.App. 96, 147 SE 2d 334 (1966). Pleadings and procedures shall be liberally construed so as to bring about decision on the merits. Grantham

v. State, 244 Ga.775, 262 SE 2d 777 (1979) [Emphasis added].

The judicial power to set aside a judgment for fraud is recognized in Official Code of Georgia, §23-2-1. Hirsch v. Collier, 104 Ga.App. 271, 121 SE 2d 318. Fraud will authorize a court of equity to set aside a written instrument. Lanning v. Scohwell, 137 Ga.App. 479, 224 SE 2d 119.

The Supreme Court has jurisidction to determine jurisdiction of a particular case. Water Power & Mining Company v. Arnold, 149 Ga. 107, 99 SE 382, and has exclusive jurisdiction in equity cases. Wyche v. Bank of Campbell County, 160 Ga. 258, 127 SE 741.

Whether a complaint sets forth an equitable or a legal cause is determined by the nature of the relief sought.

Fireman's Fund Insurance Company v. Thomas, 177 Ga. 427, 170 SE 222. In order for the action to be treated as one in equity the pleader must allege or seek to allege such cause of action as is cognizable only in a court of equity. Regal Textile v. Feil, 189 Ga. 581, 66 SE 2d 908. The test is not what the action might have been at any given time during its pendency in the trial court but what remained in it for review. Douglas-Guardian Warehouse Corporation v. Todd, 212 Ga. 791, 96 SE 2d 275; Matuazczak v. Kelly, 233 Ga. 914, 213 SE 2d.

The Plaintiff-Petitioner filed her complaint in equity, two years and eight months after the judgment was entered, alleging fraud in the Agreement and prayer for equitable relief thereby invoking

the equitable powers of the Court. Jones v. Van Vlech, 224 Ga. 796, 164 SE 2d 724; Keith v. Keith, 231 Ga. 230, 200 SE 2d 891; Towns v. Towns, 242 Ga. 580, 250 SE 2d 453. This case has retained its equitable complexion from inception through summary judgment by the Judges hearing the case and counsel for both parties, and is founded on principles unrelated to the purpose of the legislative enactment of Official Code of Georgia, §5-6-35. Denial of the Plaintiff-Petitioner's right to appeal under the "equity jurisdiction" of the Supreme Court of Georgia does in effect deny the Plaintiff-Petitioner her right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution. In fact, under the current Georgia law, there appears to be no way other

than a complaint in equity for the Plaintiff-Petitioner to have come into the Court due to the fact that her cause of action was two years and eight months old when she became aware of the fraud.

A valid statute may be unconstitutionally applied in particular circumstances because it interferes with an individual's exercise of constitutional rights. Schneider v. State, 308 U.S. 147 (1939):

> "The State's obligations under the Fourteenth Amendment are not simply generalized ones; rather, the State owes to each individual that process which, in light of the values of a free society, can be characterized as due."
>
> Justice Harlan
> Boddie v. Connecticut, 401 U.S. 371

Differences in access to the instruments needed to vindicate legal rights can be repugnant to constitution if no proper basis:

> "Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been effected by government action." Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886,895 (1961).

Liberty connotes a person's right to contract. Meyer v. Nebraska, 262 U.S. 390 (1923). Marital rights are a "basic importance" protected by the Due Process Clause of the United States Constitution, and may not be impaired unless some com-

pelling state interest of overriding significance is established. Boddie v. Connecticut, 401 U.S. 371 (1971). What the United States Constitution does require is "an opportunity granted at a meaningful time and in a meaningful manner", Armstrong v. Mango, 380 U.S. 545, 552 (1965) "for a hearing appropriate to the nature of the case." Mullone v. Central Hanover TR. Company, 339 U.S. 306 (1950) at 313.

The Georgia Supreme Court has chosen to deny to the Plaintiff-Petitioner her right to automatic appeal under "equity jurisdiction" under the guise that her appeal should have been pursued under the application procedures as set forth in Official Code of Georgia, §5-6-35.

Official Code of Georgia §5-6-35 was enacted because Article 6, §2, ¶4 and

Article 6, §2, ¶8 of the Constitution of the State of Georgia allowing appeals from all final judgments and numerous interlocutory orders generated such a massive caseload in the appellate courts. Citizens & Southern National Bank v. Rayle, 273 SE 2d 139. The court stated in Citizens & Southern National Bank v. Rayle, supra, that:

> "The clear intent of §(a)(2) above [Official Code of Georgia, §5-6-35] was to give the appellate courts (the Supreme Court in divorce and alimony cases and the Court of Appeals in child custody cases) the discretion not to entertain an appeal where the superior or juvenile court had made a decision as to divorce, alimony, child custody or contempt, the latter three of which are in large part discretionary and yet frequently appealed by the losing spouse." [Emphasis added]

The reasoning behind the enactment of Official Code of Georgia, §5-6-35 appears to be a statement by the legislature to limit review of domestic relations cases concerning divorce, alimony, child support and contempt, the latter three being in part discretionary on the part of the judges issuing the awards. All issues in domestic relations cases concerning divorce, alimony, child custody and contempt are in fact issues based on legal principles as set forth under State law.

There is no indication by the legislature enacting Official Code of Georgia §5-6-35 that it was their intent to apply this ruling to cases of fraud. Fraud is by statute and equitable remedy and a jurisdictional basis for appeal to

the Supreme Court of Georgia.

Sir Henry Maine in 1861 defined "Equity" as:

> "A body of rules of law existing by the side of the original civil or 'strict' law, founded on more or less distinct principles and claiming incidentally to supercede the strict law by virtue of a superior sanctity or ethical quality inherent in these principles."

Statutory provisions relating to appeals must be considered together and interpreted in the manner the courts perceived the legislature intended. Rosebraugh v. State Social Security Commission, 196 SW 2d 27.

Statute or constitutional provision conferring, extending or regulating the

right of appeal should be liberally construed, W. T. Rawleigh Company v. Cone, 196 So. 137, 29 Ala.App. 314; Central Data Corporation v. United States Customs and Patent Application, 499 F.2d 1304, for the furtherance of justice, In re Hurley Mercantile Company, C.C.A. Tex, 56 F.2d 1023, and in order to preserve and maintain the right of appeal, and if such statute is susceptible of different meanings it will be construed, and the doubt will be resolved, in favor of the right to appeal. Slawinski v. Mocettini, 45 Cal. Rpts. 15, 403 P.2d 143

A statute will not be construed as taking away a previously existing right of appeal unless the legislative intent to that effect clearly appears. An appeal may, under statutes bearing that con-

struction, be the exclusive method for obtaining a review in cases in which it is available, but it is not exclusive where it has been made concurrent or co-existent with some other remedy. Mitchell v. Mitchell, 233 SW 2d 187.

The Georgia State Legislature, by its enactment of Official Code of Georgia, §5-6-35, has provided application procedures for discretionary awards in divorce, alimony and child custody cases which does in fact serve a legitimate state's interest, that being to alleviate numerous appeals from discretionary awards in divorce, alimony and child custody cases. However, it was not the intent of the Georgia State Legislature to allow the Georgia courts the right to apply Official Code of

Georgia §5-6-35 to all cases arising out of a domestic relations situation, and such application would in effect thwart a person's right to appeal on other causes of action and would in no way serve or further a legitimate state's interest.

Is it now the mood of the people in this country, for the convenience of judicial economy, to give up their rights to due process of law? I think not, and the misapplication of law by the lower court wherein no legitimate state interest can be served justifies the grant of certiorari.

2. **The decision below conflicts with decisions among the lower courts.**

The decision of the Georgia Supreme Court to deny Plaintiff-Petitioner's appeal was that she did not follow the

Discretionary Appeal Procedures of Official Code of Georgia §5-6-35 (No opinion rendered).

All cases cited by the defendant-respondent in his motion to dismiss for failure to follow Discretionary Appellate Procedures, dealt with actions challenging the discretion of a lower court judge in either a contempt action, modification, reformation action or award.

The Georgia Courts have held that the equity jurisdiction is premised on the character of the action at the time a judgment complained of was rendered. Anagostis v. Alexandrou, 203 Ga. 752, (1946); Matuazczak v. Kelly, 233 Ga. 915 (1975). The Georgia Court of Appeals in Tallman v. Tallman, 161 Ga. 447 (1982),

later addressed in length the question of whether to treat a suit concerning enforcement of an alimony decree of a sister state as a contempt action thereby requiring that it be appealed to the Supreme Court of Georgia under the application procedures of Official Code of Georgia, §5-6-35. The Court held that inasmuch as the contempt feature was eliminated from the case and that the judgment was essentially a finding that the defendant is indebted in a certain amount, the Georgia Court of Appeals would hear the case and the defendant's motion to dismiss for failure to file with the Supreme Court under Official Code of Georgia, §5-6-35, was denied.

The Tallman v. Tallman, supra, case certainly represents a factual situation similar to the case at bar in that the

"domestic relations" feature was eliminated and the cause of action took on a different posture thereby allowing the plaintiff to proceed via direct appeal.

The decision rendered by the Supreme Court in the case at bar is in direct conflict with the decision rendered by the Georgia Court of Appeals in Tallman v. Tallman, supra, and justifies the grant of certiorari.

3. **The question sought to be reviewed is one of general importance in the interest of law.**

The basis of the judicial system in this country is to provide for the people the legal rights to redress for alleged violations of law. Inherent in this right to redress is the right to appeal

and this right to appeal is granted to all persons. The Georgia Supreme Court, by their expansion of an otherwise reasonably justifiable legislative act, has in effect, in the interest of judicial economy, unjustifiably denied all persons wherein a question of law may be founded in domestic relations, a direct right of appeal.

The "family unit" in our society is in fact our society. Has this country reached a position that in the interest of judicial economy that a person's rights to appeal are curtailed because the cause of action may in some form attach to a domestic relations situation? Will our courts in the future, as they have in the Petitioner's case, rationalize that where a cause of action in some form touchs the "family unit" it thereby

negates the person's direct right of appeal?

There can be no doubt that the courts in this country are bludgeoned with causes of action and the dockets are overloaded. But, is the remedy to systematically by case law chisle away a citizen's rights to access to the courts?

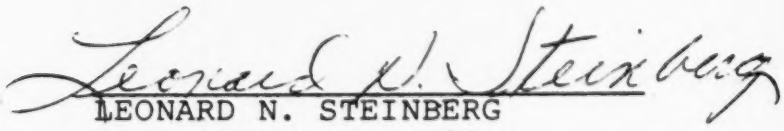
I applaud the Legislature of Georgia in its enactment of Georgia Code §6.701.1, Official Code of Georgia, §5-6-35 as a means to relieve the appellate courts of review of discretionary awards and discretionary decisions of lower court judges, but the law as set forth does not and should not be applied to circumvent a party's right to appeal in an action simply because the cause of action in some way relates to a domestic relations situation. The juris-

diction may and should be exercised in kind and form of relief demanded, and must be decided upon its own merits, upon a survey of the real and substantial convenience of all parties, the adequacy of the legal remedy, the situation of the different parties, the points to be contested, and the result, if jurisdiction should be assumed or denied. To do otherwise would be a denial of the basic concepts upon which our Constitution is premised.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment of the Georgia Supreme Court.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have on this 25th day of May, 1983 mailed three copies of this petition, first class, postage prepaid, to the following party:

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